PHC-Elko, Inc., d/b/a Elko General Hospital *and* Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO. Case 32–CA–17309

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 13, 1999, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to General Counsel's cross exceptions. The General Counsel filed cross exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Wanda Pollard. He found that Pollard engaged in protected concerted activity at a March 10, 1999 employee meeting and that she was discharged for that protected activity. The Respondent excepts, arguing, among other things, that Pollard was not engaged in protected activity and that she was lawfully discharged for her insubordinate conduct at that meeting. We reverse the judge. Applying *Wright Line*,[3] we find that Pollard's discharge did not violate Section 8(a)(1) of the Act.[4]

Background

The Respondent operates an acute-care hospital in Elko, Nevada. Pursuant to a terminable-at-will contract with Elko County, the Respondent also operates the kitchen for the county jail, located approximately 1-1/2 miles from the hospital. In early 1999,[5] there were approximately six cooks and helpers, including Wanda Pollard, who worked for the Respondent preparing meals at the jail kitchen.

In February the Union commenced an organizing campaign among the Respondent's service and technical employees at the hospital and the jail. The Respondent, in response, held a series of small group employee meetings to encourage a vote against union representation. One of these meetings was held with the jail kitchen staff on March 10.

Rick Kilburn, the Respondent's recently appointed chief operating officer, conducted the meeting. Kilburn began the meeting with a presentation advocating the Respondent's position that the employees did not need a union. Kilburn then addressed a number of "rumors" that had been circulating in the community about purportedly substandard hospital care. Kilburn told the employees that they ought to serve as "ambassadors and marketers" for the hospital in the community, and that this effort would lead not only to improved economic conditions for the hospital but also to improved pay and working conditions for all staff. Kilburn then repeated his comment that all of the employees ought to serve as "ambassadors and marketers" for the hospital.

Pollard at this point stated that she would rather resign than say anything positive about the hospital. She then related her husband's negative experience as a hospital patient. Kilburn responded that he was sorry to hear about her experience, but that she should remember that it was the doctors, not the hospital, that diagnosed her husband. Kilburn then said, "If you feel so bad about the hospital, why do you work for it?"

Later in the meeting, during a discussion about whether the jail kitchen operation was profitable for the Respondent, Pollard announced that she did not want to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that Pollard was not a statutory supervisor, we do not rely on the judge's discussion of *Ten Broeck Commons*, 320 NLRB 806, 811 (1996).

Member Schaumber finds it unnecessary to decide whether Pollard was a statutory supervisor or employee because, assuming arguendo, her employee status, he finds that her discharge did not violate Sec. 8(a)(3) for the reasons stated by the judge or Sec. 8(a)(1) for the reasons set out in this decision.

In view of our findings that Pollard's discharge did not violate the Act as alleged, we find it unnecessary to pass on the Respondent's motion for consideration of excluded evidence.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] The General Counsel has excepted to the judge's failure to find that Pollard's discharge violated Sec. 8(a)(3) of the Act. We find no merit in that exception and adopt the judge's reasons for dismissing this 8(a)(3) allegation.

[5] All dates are 1999.

work with the Respondent, but "wanted to be county."[6] Kilburn responded that Pollard would get her wish if the Respondent did not retain the contract to operate the jail kitchen.

Following this discussion concerning the profitability of the jail kitchen operation, Kilburn gathered his materials while the Respondent's chief financial officer, George Wiley, began a presentation about the hospital's patient census. At that point, Pollard stood up and said: "Come on girls . . . we've got to go cook the food for the prisoners." Kilburn told Pollard to sit down, as he had not closed the meeting. Pollard responded that it was a free country, that she did not have to sit down, and that she answered to the county sheriff. Kilburn then told her to "sit down and shut up," adding that it was his meeting and that he would determine when it was over. Pollard repeated that she did not have to sit down. Kilburn agreed. He then asked if other employees had any questions. Absent questions, he dismissed the meeting but asked Pollard to remain. Kilburn then told Pollard that she was terminated.

Pollard received a termination letter later that day, signed by Kilburn, which stated, in pertinent part, three reasons for her discharge:

> During a mandatory employee meeting today, in front of several other employees, you consistently showed your nonsupport of working at Elko General Hospital and how you "want to go back to being county." You also made comments about how you would not utilize Elko General Hospital services due to a bad experience your husband had in the past, again showing no support of your employer. The last thing you did was to dismiss the meeting yourself telling the other employees that they all needed to get back to work.

Analysis

The General Counsel alleged, and the judge agreed, that the Respondent discharged Pollard for engaging in protected activity at the March 10 employee meeting. In urging his case, the General Counsel argued initially that two of Kilburn's statements impliedly threatened employees with discharge for conduct protected by Section 7: (a) that employees ought to serve as ambassadors for the hospital (a pronouncement concerning terms and conditions of employment); and (b) asking why Pollard continued to work at the hospital if she felt negatively toward it. The judge rejected the General Counsel's argument that these statements violated Section 8(a)(1).[7]

The judge found, nonetheless, that the Respondent unlawfully discharged Pollard for engaging in protected activity at the March 10 meeting. The judge reasoned that, when Kilburn told employees that they ought to serve as ambassadors and marketers for the hospital—and tied that effort to improved pay and working conditions—he in essence instituted a term and condition of employment. The judge found that, when Pollard responded by stating before an audience of other employees that she could not be a good-will ambassador, that she would never have a good word to say about the hospital, and that she wanted to go back to being a county employee, she was criticizing the terms and conditions of her employment and therefore was engaging in protected activity. The judge thus concluded that the General Counsel had met his initial burden under *Wright Line*, supra, of showing that Pollard's Section 7 activity was a motivating factor in the termination decision. Finally, the judge found that, while Pollard may have been somewhat rude at the end of the meeting, her overall conduct was not so disruptive as to overcome a finding that she had been discharged for her protected activity. Accordingly, the judge found that the Respondent violated Section 8(a)(1) by discharging Pollard for her complaints voiced at the March 10 meeting.

The Respondent excepts, contending that Pollard's complaints at the March 10 meeting constituted neither protected nor concerted activity. Specifically, the Respondent argues that Pollard's reaction to Kilburn's exhortation that employees be good-will ambassadors for the hospital was a purely individual one based upon her personal experience with the hospital's services for her husband. The Respondent argues that Pollard's comment amounted to nothing more than mere individual griping. Regarding Pollard's comment that "we want to be county," the Respondent argues that it was not protected activity because it sought to end the relationship between the county and the Respondent. Finally, the Respondent contends that Pollard was terminated for her insubordinate conduct toward Kilburn during a mandatory meeting on working time.

This is a mixed-motive case. Whether Pollard's discharge violates Section 8(a)(1) depends on the Respondent's motive. Under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory mo-

[6] The jail food service workers had been employed by the county prior to the Respondent's obtaining the contract to provide those services.

[7] There are no exceptions to these dismissals.

tivation by proving protected activity, the employer's knowledge of that activity, and animus against protected activity, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity.[8]

We begin our analysis of the first asserted reason for Pollard's discharge by assuming arguendo that the Respondent instituted a new term and condition of employment when it said that employees should be ambassadors and spokespersons for the hospital. We also assume arguendo that Pollard engaged in protected concerted activity when she voiced her opposition to this term and condition of employment in the presence of other jail kitchen staff employees at the meeting, relating her husband's alleged bad experience as a hospital patient and saying that she would rather resign than say anything positive about the hospital.[9] In light of these assumptions, we further assume arguendo that the General Counsel met his initial burden of proof showing that the Respondent discharged Pollard for engaging in protected concerted activity.

We now examine the other two asserted reasons relied on by the Respondent in discharging Pollard to determine if the Respondent showed that it would have taken the same action against Pollard in the absence of that assumed protected activity. We find that the Respondent has established that it would have discharged Pollard in any event for her unprotected activity in the March 10 meeting. That unprotected activity had two facets. First, Pollard attempted to shut down a meeting called and conducted by Kilburn. She impugned Kilburn's authority by publicly rejecting his direction that she sit down and let the meeting continue and by further declaring that she worked for the Sheriff [and, impliedly, not for Kilburn]. She then proceeded to attempt to end the meeting—in direct defiance of the Respondent—by calling on all employees to leave the meeting and return to their cooking duties.[10] Second, Pollard explicitly advocated the demise of her own employer at the jail. She advocated that the county replace her employer. Clearly, an employer need not tolerate the disloyal actions of an employee who wishes to oust her own employer from its position as employer.[11] In sum, we find that Pollard was lawfully discharged when she insubordinately attempted to call to a halt the Respondent's March 10 mandatory meeting in direct defiance of the Respondent's officials, and when she called for the ouster of the Respondent as the employer of the jail kitchen employees.

Our dissenting colleague argues that the Respondent did not meet its defense burden under *Wright Line*. Specifically, our colleague argues that the Respondent has never sought to prove, and did not prove, that it would have discharged Pollard solely for conduct that was unprotected. We believe that the Respondent did make that showing. We recognize that the Respondent has not shown a practice of disciplining similar misconduct. However, the circumstances confronting the Respondent—an employee facing down management with defiant and disloyal speech at a preelection meeting—were unprecedented.[12] To say that an employer must show a prior instance of similar misconduct would preclude an employer from disciplining an unprecedented wrong, irrespective of how egregious that wrong might be. We reject that approach. We also note that, unlike *North Fork Services*[13] and *National Steel Supply, Inc.*,[14] cited by our colleague, there is no evidence of disparate treatment here. Neither case warrants our finding of a different result for Pollard here.

Our dissenting colleague further contends that the Respondent has not met its *Wright Line* defense because the judge found that Pollard had been terminated for all of the reasons stated in her termination letter, including arguably protected conduct.[15] The letter makes it clear that the discharge was based, at least in part, on the unprotected activities of attempting to shut down the Respondent's meeting and showing a lack of support of the Respondent, indeed calling for the demise of the Respondent. In our view, the Respondent has met its burden of showing that it would have discharged the employee for either or both of these activities, irrespective of whether she engaged in any protected activity. The Respondent was required to establish its defense only by

[8] See, e.g., *North Carolina License Plate Agency #18*, 346 NLRB No. 30, slip op. at 1 (2006); *Citizens Investment Services Corp.*, 342 NLRB 316 (2004), enfd.430 F.3d 1195 (D.C. Cir. 2005).

[9] In order to constitute protected activity, an employee's complaints must relate to the terms and conditions of his or her employment. See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

[10] See, e.g., *Dana Corp.*, 318 NLRB 312, 317 (1995) (employer lawfully discharged union supporter for engaging in insubordinate behavior at a company meeting).

[11] See, e. g., *Mountain Shadows Golf Resort*, 338 NLRB 581 (2002) (employer satisfied its *Wright Line* burden by showing that it would have discharged disloyal employee regardless of his protected activity).

[12] See *Mountain Shadows Golf Resort*, supra at 584 (2002).

[13] 346 NLRB No. 92, slip op. at 2 (2006) (employer's treatment of discriminate "stands in stark contrast to its treatment of other employees investigated and disciplined for violations of work rules").

[14] 344 NLRB No. 121, slip op. at 2–3 (2005) (written warning to discriminate "was an abrupt departure from the [employer's] admitted practice of handling disciplinary matters without paperwork").

[15] Our colleague's reliance on *Desert Toyota*, 346 NLRB No. 3, slip op. 3 (2006) is misplaced. In that case, unlike the situation here, the employer's asserted reasons for discharging the employee were mere pretexts.

a preponderance of evidence. It has met that burden. "The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merrillat Industries*, 307 NLRB 1301, 1303 (1992).

Therefore, because we conclude that the Respondent satisfied its *Wright Line* burden, we shall dismiss the complaint in regard to the Respondent's discharge of Pollard.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

This discharge case arises out of a confrontation that took place at a captive-audience meeting. While the legality of that meeting is not at issue, the acrimony generated by such gatherings—the employee here was told to "sit down and shut up"—is in bold relief. Ignoring the judge's credibility-based finding with respect to the Respondent's motive, the majority has failed to hold the Respondent to its *Wright Line*[1] burden of proving that it would have discharged employee Wanda Pollard even in the absence of her protected activity.

In a mixed-motive case, such as this one, an employer must prove that it would have taken the same disciplinary action if the employee had not engaged in protected activity. E.g., *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000). The employer must show that it "would have fired" the employee, not merely that "it could have done so." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). See, e.g., *North Carolina License Plate Agency #18*, 346 NLRB No. 30, slip op. at 2 (2006).

Here, the majority seems to assume that the Respondent met its defense burden, based simply on the finding that there was unprotected conduct for which the Respondent *could* have discharged Pollard. This approach is clearly at odds with *Wright Line*.[2] The Respondent has never sought to prove that it would have fired Pollard *solely* for the conduct that the majority finds unprotected, presumably because it has never conceded that this is a mixed-motive case.[3]

My colleagues also ignore the judge's contrary credibility finding that Pollard was terminated for all of the reasons stated in Pollard's termination letter—including the protected conduct of voicing opposition to the demand that employees serve as ambassadors and spokespersons for the Respondent.[4] That finding was based on Chief Operating Officer Rick Kilburn's demeanor, the termination letter itself,[5] and the record as a whole. And it essentially negates a *Wright Line* defense that the Respondent would have fired Pollard even absent her protected conduct.

Accordingly, I would adopt the finding that the Respondent violated Section 8(a)(1) by discharging Pollard.

Dated, Washington, D.C. August 31, 2006

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jeffrey L. Henze, Esq., for the General Counsel.
William K. Harvey, Esq., for the Respondent.
Manokharan P. Raju, Esq., for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case presents issues of whether the Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act).[2]

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] See, e.g., *North Fork Services*, 346 NLRB No. 92, slip op. at 2 (2006); *Desert Toyota*, 346 NLRB No. 3, slip op. at 3 (2006); *National Steel Supply, Inc.*, 344 NLRB No 121, slip op. at 2–3 (2005).

[3] Notably, the Respondent has never conceded that Pollard engaged in *any* protected activity. My colleagues argue that the Respondent is not obligated to show that it has a practice of disciplining employees for similar alleged misconduct. But, neither the judge nor I rely on the absence of evidence showing a history of disciplining for such misconduct in finding that the Respondent has failed to make out its defense. Rather, we rely on the fact that the Respondent failed to make a credible showing that it would have discharged Pollard for any one of the acts mentioned in her discharge letter. And there is no legal or factual basis for overturning the judge's credibility finding that the Respondent relied on all of the reasons stated in Pollard's termination letter for discharging Pollard.

[4] I do agree, as set forth in footnote 1 of the majority opinion, that there is no basis for reversing the judge's credibility resolutions, including this one.

[5] Contrary to the majority's implicit assertion, there is nothing in the Respondent's letter establishing that the Respondent would have discharged Pollard for each separate incident of alleged misconduct, instead of for all of the incidents together.

[1] This case was heard at Elko, Nevada, on August 3–5, 1999. All dates refer to 1999 unless otherwise stated.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.[3]

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates an acute-care hospital in Elko, Nevada. In March 1999 the Respondent's management staff relevant to this case consisted of Chief Executive Officer Rick Kilburn, Chief Financial Officer George Wiley, Food Service Director Chazz Armstrong, and Director of Human Resources Janie Wadford.

Prior to July 1998 this hospital had been owned and operated as a county facility. While a Government operation the hospital supplied cooking staff for the county jail which is located approximately 1-1/2 miles from the hospital. In July 1998 the Respondent purchased the hospital and it then became a private institution. The jail cooking arrangement continued under the auspices of the Respondent through a contract with the county. There are approximately six cooks and helpers employed at the jail kitchen. One of the jail cooks was Wanda Pollard. The main issues in this case revolve around: 1) whether Pollard was a "supervisor" within the Act's definition, and, therefore, not entitled to protection under the Act, 2) whether Pollard was engaged in union activity or protected concerted activity during a March 10 employer meeting, and 3) did the Respondent violate the Act when it discharged Pollard immediately following the March 10 meeting.

III. POLLARD'S SUPERVISORY STATUS

The rights enumerated in Section 7 of the Act generally do not apply to persons who are "supervisors" within the definition of the Act. Section 2(11) of the Act defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that the possession of any one of the indicia of supervisory authority specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee, provided such authority is not exercised in a routine manner but with independent judgment on behalf of management. *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1445 (9th Cir. 1991); *Rest Haven Nursing Home*, 322 NLRB 210 (1996). The burden of proving that an individual is a supervisor is on the party alleging that supervisory status exists. *NLRB v. Bakers of Paris*, supra; *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992).

The Respondent asserts Pollard was a supervisor and that, therefore, her termination cannot be found to violate Section 8(a)(1) and (3) of the Act. Thus, the Respondent has the burden of establishing that Pollard possessed sufficient authority to be classified as a supervisor within the meaning of the Act.

Pollard was a senior member of the jail kitchen staff. Prior to the Respondent's July purchase of the hospital, Pollard had been responsible for ordering the food for the jail. She continued performing this function after the Respondent bought the hospital.

Respondent's Food Service Director Chazz Armstrong had an office at the hospital. He seldom visited the jail kitchen but regularly telephoned Pollard to discuss operations at the jail. In November 1998 Armstrong received complaints about the work of jail kitchen employee, Jacquelyn Porter. In order to alleviate the problems Armstrong decided to prepare job descriptions setting forth the duties of all jail kitchen personnel. The job descriptions were distributed at a meeting of all jail kitchen employees held in mid-November.[4] Armstrong told the employees that Pollard had been designated as their group leader and if they had any problems they should go to her first. The job descriptions contained the statement that, "failure to follow these written dutie's [sic], or any verbal or written direction from either the group leader, or the director may be cause for diciplinary [sic] action." Pollard received a raise upon her appointment as group leader of an additional $8 per shift.

After Pollard was appointed group leader she continued to be concerned about Porter's job performance. Pollard complained to Armstrong about Porter on several occasions. Armstrong eventually determined to discipline Porter, and on December 4, 1998, he prepared a written reprimand addressed to her. Armstrong then went to the jail at about 1:30 p.m. to give Porter the reprimand. When he arrived he learned that Porter had left for the day. The following week Armstrong was reviewing timecards and noticed that Porter stated on her card she had left work on December 4 at 3:30 p.m. Armstrong decided that Porter had falsified her timecard and, after consultation with Respondent's human resources director, made the decision to terminate Porter. Pollard was not involved in the discussions concerning this discharge.

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[2] 29 U.S.C. § 158(a)(1) and (3). This case also involves expedited treatment under the terms of Sec. 10(j) of the Act.

[3] The Respondent filed two unopposed posthearing motions. The first, a motion to receive Respondent's exhibits, asks that R. Exhs. 12, 13, and 14 be received into the record. That motion is granted. The second motion, to correct the transcript, is likewise granted and that motion is received as R. Exh. 15.

The sequestration rule had been invoked at the start of the hearing. Fed.R.Evid. 615. Respondent's brief renews its objection to the receipt of testimony by Paul McKenzie because of a breach of the sequestration rule. McKenzie was called as part of the Government's rebuttal case although he admittedly had been in the courtroom for part of the hearing. McKenzie testified without contradiction that he did not hear the testimony of Wanda Pollard or Marguerita Cortes. His testimony concerned their evidence. As I have not relied upon McKenzie's testimony in reaching my decision, and as he did not hear other witnesses' relevant testimony, I deny the Respondent's motion to strike his testimony. *Greyhound Lines, Inc.*, 319 NLRB 554 (1995); *Continental Winding Co.*, 305 NLRB 122, 129 (1991).

[4] Normally no more than three jail kitchen employees worked at any given time because they were assigned as morning or afternoon cooks and helpers.

When Porter was terminated, Maryanne Neff was transferred from the hospital kitchen to work at the jail kitchen. Armstrong made the decision to transfer Neff. After he made that decision he telephoned Pollard to inform her about Neff's new assignment and asked if she thought Neff was a good choice "personality wise."

During Pollard's tenure as group leader employee Sandra Bell was promoted to afternoon cook, and ultimately was given a shift change. The record does not establish that Pollard participated in these decisions.

Maria Kirby was hired during the time Pollard served as group leader. Armstrong made the decision that Kirby was to be interviewed and he asked Pollard to be present. Pollard did not actively participate in the interview, and at the conclusion Armstrong asked her if she thought Kirby would get along with the other employees. Pollard told Armstrong that Kirby seemed friendly and should work out. Armstrong then instructed Pollard to take Kirby to the jail and show her what to do. Kirby began working at the jail the following day.

Pollard participated in filling out evaluations for Neff, Kirby, and Bell. Armstrong testified that he gave Pollard copies of the evaluation forms and instructed her to either fill them out or have the employees complete them. Pollard gave the forms to Neff and Kirby and told them to fill them out. Kirby and Neff told Pollard they did not want to do the forms and asked that she complete them. Pollard filled in the evaluations, gave them back to Neff and Kirby, and said to pass them along Armstrong. Armstrong testified that he relied on reports from Pollard to determine how employees were performing at the jail kitchen. Armstrong had the final approval authority of evaluations. He testified that employees routinely received a 3-percent wage increase if their evaluation was satisfactory.

The scheduling of employees at the jail was a routine matter done monthly to insure that all shifts were covered. Pollard gave a pretrial affidavit to the investigating Board agent, which set forth her role in scheduling work:

> I tried to hold a meeting once a month to plan the schedule for the next month. If there was a dispute as to who could have time off, a particular day off, the person who requested the time off first was the person who got the time off. If someone called in sick, they would call me, even if I was off work. Then I would call . . . who had the least amount of time, of hours worked, and was not working that day. However, the decision to call an employee was not only related to the least number of hours worked, but I also took into account such things as whether the individual had small children and was not able to get child care.

When employees wanted time off they also would seek their own replacement and notify Pollard of the substitution. If independent substitution was not possible Pollard would arrange for another employee to work the shift. Employees would fill out vacation preference slips for time off they desired. These slips were then sent to Armstrong for approval after assurances from Pollard that the shifts were covered.

Pollard could make changes in menus if there were not enough supplies to prepare the scheduled items and direct the employees accordingly.

IV. ANALYSIS OF POLLARD'S SUPERVISORY STATUS

No evidence was presented regarding Pollard's authority to suspend, lay off or recall employees. Regarding Pollard's authority to hire and transfer, the record shows only her peripheral involvement with the transfer of Neff and the hire of Kirby. The Board does not find limited participation in the interview process to be sufficient to bestow supervisory status. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 fn. 9 (1998); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989). Armstrong's perfunctory solicitation of Pollard's opinion about hiring and transferring these employees is not sufficient to prove supervisory status. While employee Bell was promoted during Pollard's tenure as group leader, Pollard was not shown to be involved in the decision. In sum, I find that Pollard did not have the authority to hire, transfer, or promote other employees, or to effectively recommend these actions.

Porter was disciplined and discharged while Pollard was the group leader. Pollard's complaints to Armstrong led him to craft a disciplinary notice to Porter and independently decide to terminate her. The notice given employees that failure to follow Armstrong or Pollard's directions "may be cause for diciplinary [sic] action" is equivocal as to what exactly would occur should a discipline problem arise or who would be responsible for the process. Pollard's role in the Porter situation was limited to reporting problems to higher management and not one of taking independent action. I find there is insufficient evidence to conclude that Pollard possessed the authority to discharge, suspend, or discipline employees, or to effectively recommend such action. *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989) (an employee does not become a supervisor if her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees' job status).

In applying the indicia of assignment and responsible direction, the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, and between the appearance of supervision and supervision in fact. *KGTV*, 329 NLRB 454, 458 (1999); *Providence Hospital*, 320 NLRB 717, 725 (1996), enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997) (test to determine if employee responsibly directs others, for purpose of Act's exemption for supervisors, is applied with respect to fundamental twin principles that supervisor represents interests of his employer vis-à-vis other employees and is not one of the gang who merely gives routine instructions).

Pollard's assignment and direction does not involve the requisite exercise of independent judgment because it does not require anything but routine assignments such as scheduling and preparing meals. Employees commonly adjusted their own schedules without Pollard's participation. This scheduling activity is thus more clerical than supervisory. *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1447 (9th Cir. 1991); *NLRB v. St. Francis Hospital*, 601 F.2d 404, 421 (9th Cir. 1979); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996) (assignments made on a monthly basis with routine rotation did not indicate the exercise of independent judgment); *Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997) (rotation of tasks among employees is not independent judgment). *Washington Nursing Home*, 321 NLRB 366 fn. 4

(1996) (authority to make adjustments to the assignments and to take corrective action based on patient needs was routine); *Ohio Masonic Home*, 295 NLRB 390, 395 (1989) (balancing work assignments among staff members or using other equitable methods does not require the exercise of supervisory independent judgment).

Pollards' role in the evaluation of kitchen staff did not qualify as supervisory authority. She merely submitted the evaluations to Armstrong without any recommendation regarding pay increases or promotions. Armstrong was casual at best as to what he expected from the evaluations, to the point of telling Pollard the employees could fill them out themselves. There is no evidence that Pollard's role in the evaluations was more than routine. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989) (charge nurses found nonsupervisory in part because their evaluations did not involve recommendations regarding promotions, wage increases, discipline, or retention). In sum, the record indicates that Armstrong retained the authority to determine and effectuate any personnel actions flowing from the evaluations prepared by Pollard. The Board has consistently declined to find supervisory status when a lead person performs evaluations that do not, by themselves, affect other employees' job status. *Ten Broeck Commons*, supra at 813. I, therefore, conclude that Pollard's evaluations of kitchen staff did not manifest supervisory authority under Section 2(11) of the Act. *NLRB v. Bakers of Paris*, supra at 1446–1447; *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410–1411 (9th Cir. 1985); *Ahrens Aircraft, Inc.*, 259 NLRB 839, 843 (1981), enfd. 703 F.2d 23 (1st Cir. 1983).

The Board is cautious in finding supervisory status because supervisors are excluded from the protections of Section 7 of the Act. "In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights." *East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999). See also *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981) (because a worker deemed to be a supervisor loses his or her organizational rights, the Board should not construe supervisory status too broadly), cert. denied 455 U.S. 1017 (1982); *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), enfg. 171 NLRB 1239 (1968), cert. denied 400 U.S. 831 (1970). I find that the Respondent has failed to establish that Pollard had the authority to hire, transfer, promote, suspend, discharge, discipline, layoff, recall, promote, reward, assign, or responsibly direct other employees, or authority to effectively recommend any of these actions. I find, therefore, that the Respondent has failed to meet its burden of establishing Pollard's supervisory status under the Act.

V. EMPLOYEE MEETING OF MARCH 10

In late 1998 the Union was in the midst of an organizational campaign concerning nurses at the hospital. Beginning in February 1999 the Union commenced attempting to organize the service and technical employees. Pollard supported the Union's efforts and engaged in some organizing activities on its behalf. The Respondent opposed the Union's organizational efforts, and as part of this opposition held several small group meetings with service employees who potentially would be included in such a unit. One of these meetings was held with the jail kitchen staff on March 10, and is the central scene for this case.

Respondent's CEO Rick Kilburn first became employed at the hospital on January 11, 1999. Kilburn was unfamiliar with the jail kitchen personnel when he called them to the March 10 meeting at the hospital. The purpose of this meeting was for Kilburn to introduce himself, discuss the Respondent's position on the Union and have a general exchange with employees on other matters. The six jail kitchen staff and one hospital kitchen employee attended this meeting. Present for management were Kilburn and CFO Wiley. Human Relations Director Janie Wadford was also present during part of the meeting. Kilburn had never met Pollard before and the parties stipulated that the Respondent did not have any knowledge of her union activities at any point before this meeting.

Several witnesses including Pollard and Kilburn testified as to what was said during the meeting. While there is not a great deal of dispute about what occurred, each witness had varying degrees of recollection and emphasis as to what was said and done at the meeting. I have carefully considered the demeanor of the witnesses in reaching the following findings as to what the credible evidence shows happened at the March 10 gathering.

Kilburn introduced himself and Wiley to the employees and they in turn were asked to introduce themselves to the managers. Kilburn then proceeded to make a presentation advocating the Respondent's position that the employees did not need union representation. He concluded these remarks by telling the employees that whether they supported the Union was their decision to make.

Kilburn then turned the discussion to the subject of rumors that had been circulating in the Elko community about the hospital. This included rumors that the hospital was substandard. Kilburn gave his reply to the various rumors and concluded by telling the assemblage:

> . . . I said something to the tune of there's . . . a lot of rumors coming in the community and inside the hospital, and coming from with inside [sic] the hospital, and those rumors I talked about and I said, you know, we need to have patients in the hospital in order for us to secure our employment, that's the only reason we're here, and we ought to be ambassadors and marketers for this facility and that, in and of itself, helps us grow and provide additional services at this hospital, and has doctors wanting to admit patients here and patients wanting to come here. (Kilburn, Tr. 50–51.)
>
> . . .
>
> I felt to use this as an opportunity to try to rally people around and supporting the hospital. And that people ought to be ambassadors and marketers of, as employees, because it benefited everybody. It benefited the community, the patients and certainly the employees. I mean the more patients we have, the more employees we can have, the more equipment we can buy, pay raises, all of those things are very important related to patients coming to the hospital. And that by all of the negative comments we're really hurting the image of the hospital, not that it's ever been very good, but the fact that employees—and what I was saying is, I, myself, can't do this job, we all ought to be

> marketers and ambassadors for what goes on here at the hospital. (Kilburn, Tr. 213–214.)

At this point Wanda Pollard spoke up and said she would rather resign her position than say anything positive about the hospital. She then related how she had taken her seriously ill husband to the hospital on two occasions and the doctors could not discover what was wrong with him. She finally took him to a hospital in Boise, Idaho, where he was diagnosed with a ruptured appendix.

Kilburn said he was sorry to hear about her experience but she should remember that the hospital did not make the diagnosis, the doctors did. He then said, "If you feel so bad about the hospital, why do you work for it?" (Kilburn, Tr. 220.)

The discussion then changed to the subject of whether the jail kitchen operation was profitable and would be continued. Pollard again spoke up and said:

> . . . we don't want to be with you anyhow, we want to be county and it's a free country and I can say what I want and I'm going to go to the county and tell them. . . . (Kilburn, Tr. 221.)

Kilburn told Pollard that if the hospital did not continue its contract with the county for the jail kitchen operations, she would have the opportunity to return to being a county employee. I do not find, as the Government urges, that the credited testimony shows Kilburn told Pollard he would see to it that the employees went back to county employment.

The CFO George Wiley then began making a presentation on a display board about the hospital's patient census and how important that was to the operation of the institution. Kilburn was shuffling papers and waiting to conclude the meeting. Pollard stood up at this point with her keys in her hands, and said, "Come on girls, . . . we've got to go cook the food for the prisoners." (Kilburn, Tr. 223.) Kilburn immediately told Pollard that he had not closed the meeting and to sit down. Pollard responded that she did not have to sit down, that it is a free country and she could stand. Pollard said she answered to the Sheriff. Kilburn told her to sit down and shut up. Kilburn said that he was the CEO of the hospital, that it was his meeting, and he would determine when it was over. Pollard again reiterated that she did not have to sit down, and Kilburn said, "you are right." Kilburn then asked if anyone had any questions. No one responded, and Kilburn dismissed the meeting but told Pollard to remain.

The other employees left the meeting room and Kilburn told Wadford that he wanted her to prepare termination papers for Pollard because of her insubordination. At this point Pollard was told she was discharged and she left. Pollard subsequently received a termination letter signed by Kilburn dated March 10. That letter reads in pertinent part:

> During a mandatory employee meeting today, in front of several other employees, you consistently showed your nonsupport of working at Elko General Hospital and how you "want to go back to being county." You also made comments about how you would not utilize Elko General Hospital services due to a bad experience your husband had in the past, again showing no support of your employer. The last thing you did was to dismiss the meeting yourself telling the other employees that they all needed to get back to work. This meeting was a mandatory meeting being held by hospital administration and should have been dismissed by hospital administration. When the CEO told you to stay put, the meeting was not over until he dismissed the meeting, you became confrontational and showed total disrespect toward your employer.
>
> This type of behavior goes against the Mission and Vision of the hospital and will not be tolerated at Elko General Hospital. Therefore, effective today, March 10, 1999, your employment with Elko General Hospital is being terminated. (GC Exh. 5.)

Kilburn testified that Pollard was terminated solely because she dismissed the meeting before he had concluded it himself. Considering his demeanor in this regard, as well as the termination letter and the record as a whole, I conclude that Pollard was terminated for all of the reasons stated in the first paragraph of the letter quoted above.

VI. POLLARD'S PROTECTED CONCERTED ACTIVITY

The Government argues that Pollard's protestation to Kilburn about saying anything positive concerning the hospital was concerted activity protected by the Act. The Respondent defends by saying that such conduct was Pollard's individual conduct and is not concerted nor protected under the Act.

Kilburn told the employees that he alone could not improve the reputation of the hospital in the community. He emphasized to them that they ought to serve as ambassadors for the hospital and that this effort would have the positive effect of improving the economic condition of the hospital and the employees. He tied the ambassadorial effort to the employees' improved pay and working conditions ("we need to have patients in the hospital in order for us to secure our employment," it "helps us grow," "the more patients we have, the more employees we can have, the more equipment we can buy, pay raises, all of those things are very important related to patients coming to the hospital"). When Kilburn told the employees to support his community campaign he linked the effort to increased equipment and wage increases for the employees. I find that he was thus instituting a term and condition of employment for the employees. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978) ("Few topics are of such immediate concern to employees as the level of their wages."); *Enterprise Products*, 264 NLRB 946, 947–948 (1982) (urging employees to cooperate in a program to boost production that would be rewarded with athletic and entertainment tickets held connected to employees remuneration). When Pollard refused to cooperate with the ambassadorial program, even though it could lead to pay raises, Kilburn responded by asking her why she would continue to work for the hospital.

The Board has held that a worker's remarks concerning terms and conditions of employment made in the midst of an employee meeting are concerted protected activity. *Avery Leasing, Inc.*, 315 NLRB 576, 580 fn. 5 (1994) ("Where an employee in the presence of other employees, complains to management concerning wages, or other terms and conditions of employment, such complaints constitute protected concerted activity, even though the employee purports to speak on behalf of himself or herself."); *Autumn Manor*, 268 NLRB 239, 244 (1983) (Section 7 protects employees who, in the presence of other employees, question their

employer about terms and conditions of employment); *Enterprise Products*, 264 NLRB 946 (1982) (employee remarks about an employer's plan to give employees entertainment tickets rather than a raise); *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534–1535 (11th Cir. 1987) (employee challenging a work rule in a group meeting was engaged in concerted activity, even though the employee had not consulted with the other employees beforehand about her criticisms). I find that when Pollard protested against supporting Kilburn's ambassadorial efforts, she was engaged in protected concerted activity.

Pollard also told Kilburn of the employees' dissatisfaction with working for the Respondent when she stated, "we don't want to be with you anyhow, we want to be county." (Pollard testified that the background of her remark was her perception that the Respondent had reneged on a promise to increase the employees' benefits over what they had been as county jail employees.) I find that when Pollard proclaimed the employees' feelings about working for the Respondent she was engaged in protected concerted activity under the Act.

VII. THREAT OF DISCHARGE

The Government alleges that Kilburn's statement that employees ought to serve as ambassadors for the hospital is an implied threat to employees that if they did not comply they would be terminated. Alternatively, the Government asserts that Kilburn's question to Pollard as to why she continued to work for the hospital if she felt negatively towards it is a solicitation that she quit her employment. These arguments are based on the premise that such statements reasonably threaten, restrain, and coerce employees for engaging in conduct protected by Section 8(a)(1) of the Act.

I have found that Kilburn's announcement of the efforts to have employees serve as ambassadors because of its implications for employees' wages and working conditions was a pronouncement concerning terms and conditions of employment. I do not agree, however, with the Government's theory that by setting forth this policy that Kilburn impliedly threatened employees with discharge for not complying. That contention presumes too much in light of the record as a whole.

The Government's other argument concerning a violation, i.e., Kilburn's questioning why Pollard would want to work at the hospital, is a closer question. The Board has long held that suggesting to union supporters that they quit their employment conveys the impression that such support is incompatible with continued employment and implicitly threatens discharge. The Board finds that such statements reasonably threaten, restrain, and coerce employees for engaging in conduct protected by Section 8(a)(1) of the Act. *Gravure Packaging, Inc.*, 321 NLRB 1296, 1303 (1996); *Stoody Co.*, 312 NLRB 1175, 1181 (1993); and *Heartland Of Lansing Nursing Home*, 307 NLRB 152 (1992). I find, however, that the instant case is distinguishable from that line of authority. In the context of Pollard's vociferous proclamation that she would never say anything positive about the hospital, Kilburn's question would appear to be a reasonable one. I find that Kilburn's questioning if Pollard felt so strongly against the hospital, "why do you work for it?," did not reasonably threaten, restrain, and coerce employees for engaging in conduct protected by the Act. *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 10 (1999) (no violation of the Act when supervisor questioned an employee wearing a badge stating "Slave Co." as to why he wanted to continue to work there.)

VIII. POLLARD'S DISCHARGE—THE 8(a)(1) THEORY

As found above, Pollard was engaged in protected concerted activity when she challenged Kilburn at the March 10 meeting. The result of her conduct during the meeting was Pollard's discharge immediately following the meeting. The Respondent argues that the discharge related solely to her attempt to unilaterally conclude the meeting before Kilburn had finished. The facts are to the contrary. Kilburn's letter of termination cites several instances of misconduct that led to Pollard's termination, including: "[Y]ou consistently showed your nonsupport of working at Elko General Hospital and how you 'want to go back to being county.' You also made comments about how you would not utilize Elko General Hospital services due to a bad experience your husband had in the past, again showing no support of your employer." I thus find that the Government has shown by a preponderance of the evidence that Pollard's discharge resulted, at least in part, because she engaged in protected concerted activity. I further find that the Respondent has failed to overcome this showing. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Kilburn's letter basically cites three instances of conduct that led to Pollard's termination. The last reason given was her insubordinate conduct in attempting to terminate the meeting before Kilburn had finished. While this conduct was rude, it is only one of the reasons cited for the discharge. I do not find that Pollard's conduct during the meeting was so disruptive as to overcome the finding that she was discharged, at least in part, because of her protected concerted activity. *C & D Charter Power Systems*, 318 NLRB 798–799 (1995); *Prescott Industrial Products*, 205 NLRB 51, 52 (1973). I conclude, therefore, that the Respondent has failed to prove that Pollard would have been discharged regardless of her protected concerted activity. I therefore find that the termination of Wanda Pollard violated Section 8(a)(1) of the Act.

IX. POLLARD'S DISCHARGE—THE 8(a)(1) THEORY

The Government additionally alleges that Pollard's discharge violates Section 8(a)(3) of the Act because it resulted from her engaging in union activity. The Respondent argues that there is no evidence that it had knowledge of Pollard's union activities, and thus her termination can not be attributed to such protected activity.

The parties stipulated that the Respondent had no knowledge of Pollard's union activities prior to the March 10 meeting. The Government concedes that Pollard did not say anything directly about the Union during the meeting. The Government's theory is that the purpose of the meeting was to convince employees not to support the Union and that Pollard's critical remarks would have made it "perfectly clear to Kilburn and Wiley that Pollard disagreed with Respondent's 'non-union' agenda."

While it is possible that Kilburn harbored suspicions that Pollard was a union supporter because of her conduct during his meeting, such a conclusion is speculation. I do not infer that the discharge was in any way based on Pollard's union sympathies. I find that the Government has failed to prove by a preponderance

of the evidence that Wanda Pollard's discharge was a violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. PHC-Elko, Inc., d/b/a Elko General Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Operating Engineers Local Union No. 3, International Union of Operating Engineers AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, PHC-Elko, Inc., d/b/a Elko General Hospital, Elko, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Wanda Pollard, or any other employee, for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Wanda Pollard full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Wanda Pollard whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Wanda Pollard, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999).

(e) Within 14 days after service by the Region, post at its facilities in Elko, Nevada, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 1999. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against Wanda Pollard, or any of our employees for engaging in protected concerted activity under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Wanda Pollard full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Wanda Pollard whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Wanda Pollard, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

PHC-ELKO, INC., D/B/A ELKO GENERAL HOSPITAL